FE 302 Lesson 5
Project Risk Mitigation

Changed Conditions on Construction Projects

Lesson 5, Project Risk Mitigation

TLOs-Given a construction scenario, analyze project issues and formulate alternative responses.

ELOs:

Identify assigned project issues.

Analyze project issues in terms of impact to project cost, schedule, and performance.

Utilize any pre-project initiation risk mitigation plan to complete full analysis.

Recommend the project mitigation strategy to keep the project completion on track.

Estimate through the remaining project duration any adjustments to the risk management plan.

What Causes Changes on Government Projects?

What Makes Construction Different?

- Latent/Patent Ambiguities
- Contract Interpretation
- Impact Costs
- Delays
- Defective Design
- Excessive Punch Lists
- Changed Work Conditions
- Constructive Acceleration
- Constructive Changes
- Over Inspection
- Superior Knowledge
- Inspection of Construction
- Invoicing, Retainage, Withholding
- FOOH and HOOH
- Extended OH, Unabsorbed OH
- Use and Possession Prior to Completion
- Turnover of Construction
- Warranties
- Performance Evaluations
- Waiver of Completion Date

Changes Clause

FAR 52.243-4 (Fixed-Priced Construction >$100,000)

- **Policy**
  - **Establishes authority to make changes within the general scope of the contract**
- **Purpose**
  - **Gives government flexibility and compensates contractor**
- **Highlights**
  - **KTR must give written notification to KO within 20 days of perceived change order**
  - **No adjustments after final payment**

Differing Site Conditions Clause

FAR 52.236-2

- **Policy**
  - **Requires KTR to notify GOV of any differing site conditions - promptly and before conditions are disturbed**
- **Purpose**
  - **Shift risk to GOV and eliminate bid contingencies**
- **Highlights**
  - **2 categories (Type I and Type II)**

Default Clause

FAR 52.249-10 **(fixed-price construction)**

- **Policy**
  - **Allows GOV to terminate KTR who fails to complete the work**
  - **Allows KTR to receive time extensions for delays**
- **Purpose**
  - **Provides remedy for breach of contract**
- **Highlights**
  - **GOV can terminate for <u>actual</u> or <u>implied</u> breach**
  - **10-day notification requirement**

Default Clause

FAR 52.249-10

- **Limitations:**
  - **The government can't default a contractor or assess LDs if the delay arises from unforeseeable causes beyond the control and fault of the KTR**
  - **Some examples are:**
    - **Acts of God or public enemy**
    - **Acts of the government**
    - **Acts of another contractor**
    - **Strikes**
    - **Unusually severe weather**
    - **Delays from subs and suppliers at any tier arising from unforeseeable causes beyond their control and that of the prime**

Disputes Clause

FAR 52.233-1

- **All disputes (and claims) that arise under the contract are resolved under this clause**
- **KTR claims over $100,000 must be certified**
- **KTR claims accrue interest from the date received by the KO**
- **The KO must issue a decision:**
  - **On claims less than or equal to $100,000**
    - **- Within 60 days of receipt**
  - **On claims greater than $100,000**
    - **The KO must notify the KTR of the date which a decision will be made**
- **The KO's decision must inform the KTR of its appeal rights**

Request for Information (RFI)

- RFIs are submitted by the general contractor who has question(s) about the contract's terms and conditions and wants a government response.
- RFIs can appear at any time, but most often:
  - At the preconstruction conference
  - At regular progress meetings
  - On a daily report (CQC or DRI) submitted to the COR
- KO must respond in a timely manner or a

Request for Equitable Adjustment (REA)

- Submitted by contractors, usually after submitting an RFI, who have encountered a perceived change to the contract, that is not authorized by the KO
- REAs usually include a request for money, time or both

Constructive Change

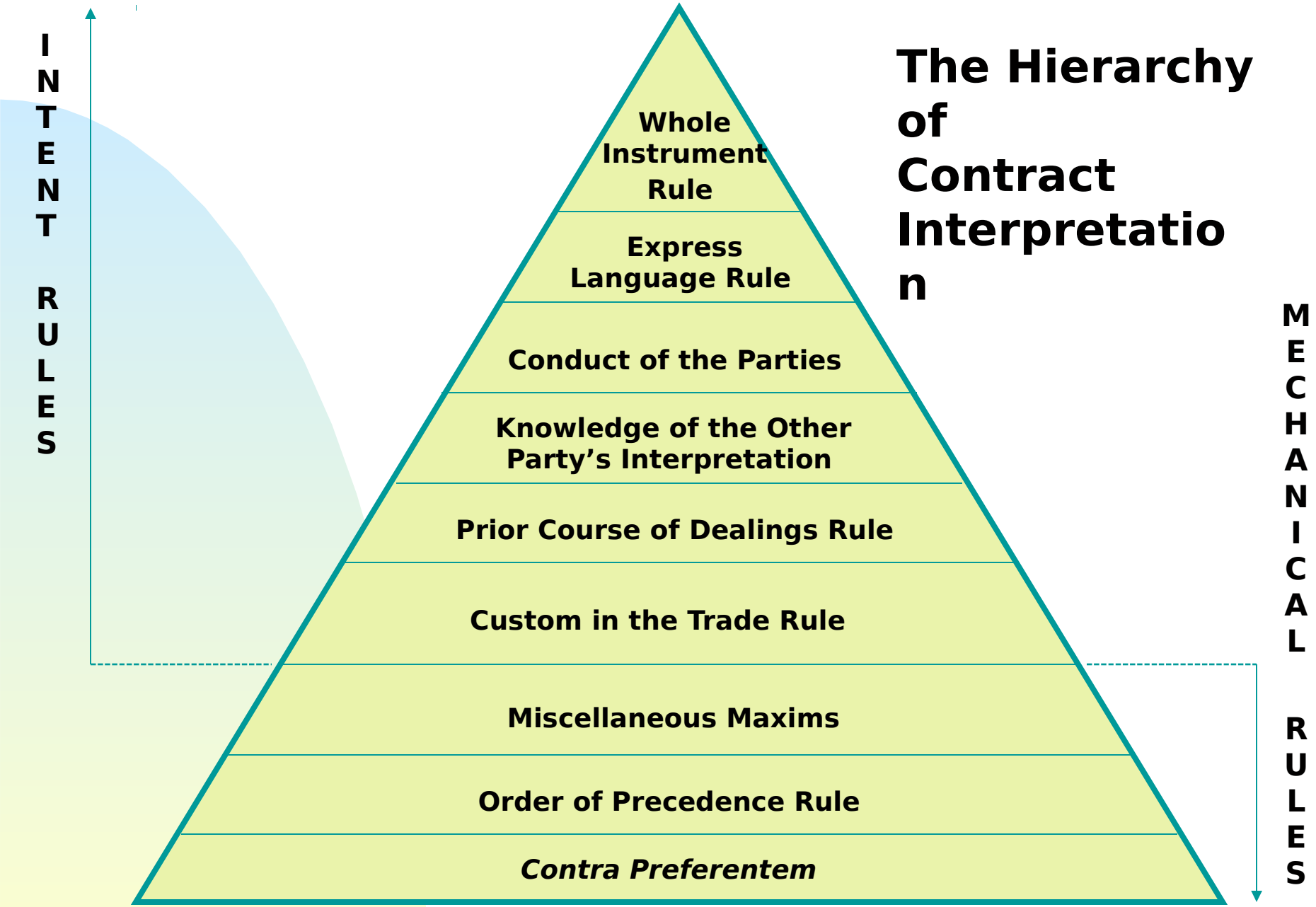
Definition:

Unauthorized change ordered by the government affecting scope of work, including money, time, or both

Differing Interpretations of the Contract

- **Most Common Type of Constructive Change**
- **KTR & GOV'T Differ On What Is Required**
- **Order Element – GOV'T directs KTR to perform in accordance with GOVT interpretation**
- **Case Law Supports that KTR May Prevail If They have a Reasonable Interpretation**

The Hierarchy of Contract Interpretation



Don't Forget the Wild Card: The Duty to Inquire Rule

Defective Specifications

"Protection for the Government"

DFARS 252.236-7001(b) Contract Drawings and Specifications

- **The Contractor shall:**
- **Check all drawings immediately**
- **Compare all drawings and verify before layout**
- **Promptly notify the KO of discrepancies**
- **Be responsible for any errors that might have been avoided by complying with above**

Defective Specifications

"Protection for the Government"

- ***DFARS 252.236-7001(d) Contract Drawings and Specifications***
- **What about omissions from the drawings and specifications or the misdescription of details of work that are manifestly necessary to carry out the intent of the drawings and specifications or that are customarily performed?**
- ***These situations:***

  "shall not relieve the contractor from performing such omitted or misdescribed details of the work. The contractor shall perform such details as if fully and correctly set forth and described in the drawings and specifications."

Claim

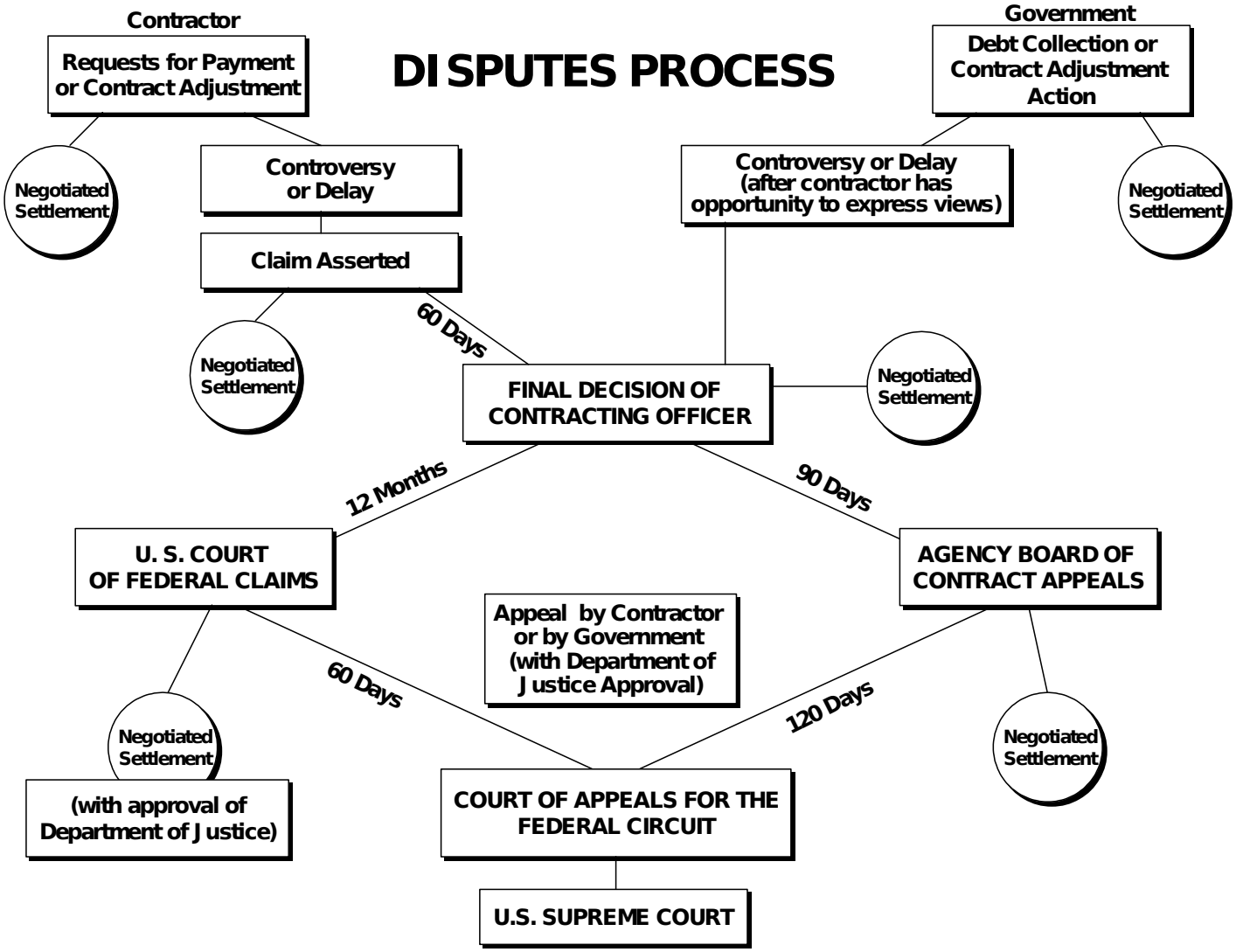
- **A claim is a written demand by one of the contracting parties seeking money, time, or both.**
- **Two Types of Claims:**
  - **<u>Entitlement</u> – Gov't Disputes Right for Additional Compensation.**
  - **<u>Quantum</u> – Gov't Considers Meritorious, But Not Agree On Amount**

REA vs. Claim

"A Claim is an REA but an REA is not Necessarily a Claim"

- Both can include direct costs, indirect costs, profit, and time.
- REAs:
  - The costs of preparing an REA (legal and accounting fees and negotiation expenses are allowable).
  - But interest is unallowable
- Claims:
  - The costs of preparing a claim and the prosecution of a claim are unallowable
  - But interest will accrue from the date submitted until the date of payment

Disputes Process



Alternative Disputes Resolution

ADR is defined as “Any procedure or combination of procedures voluntarily used to resolve issues in controversy without the need to resort to litigation.”

FAR 33-201

A CONTINUUM OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES

COOPERATIVE DECISION MAKING	THIRD PARTY ASSISTANCE WITH NEGOTIATIONS OR COOPERATIVE PROBLEM SOLVING			THIRD PARTY DECISION MAKING	
Parties are Unassisted	**Relationship Building Assistance**	**Procedural Assistance**	**Substantive Assistance**	**Advisory Non-Binding Assistance**	**Binding Assistance**
• Conciliation • Information Exchange Meetings • Cooperative/ Collaborative Problem-Solving • Negotiations	• Counseling/ Therapy • Team Building • Informal Social Activities	• Coaching/ Process Consultation • Training • Facilitation • Mediation	• Mini-Trial • Technical Advisory Boards/ Disputes Panels • Advisory Mediation • Fact Finding • Settlement Judges	• Non-Binding Arbitration • Summary Jury Trial	• Binding Arbitration • Med-Arb • Mediation-then-Arbitration • Disputes Panels (binding) • Private Courts/ Judging

Lesson 5 Exercise

- Your team will be given various issues which have arisen in your assigned project.
- Your task is to propose resolutions identifying and quantifying the impacts.
- You will also revisit your previously submitted RMP and determine if adjustments need be made

Questions?